STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0954

State of Minnesota,
Respondent,

vs.

Andrew Malachi Wencl,
Appellant.

Filed July 22, 2008
Affirmed
Peterson, Judge

Steele County District Court
File No. 74-KO-06-563

Lori Swanson, Attorney General, Tibor M. Gallo, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Douglas L. Ruth, Steele County Attorney, 303 South Cedar, Owatonna, MN 55060 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal challenging convictions of and sentences for three counts of being a felon in possession of an explosive device, appellant argues that (1) the evidence was insufficient to show that the "MacGyver bombs" that he created were "explosive devices" within the meaning of Minn. Stat. § 609.668, subd. 1(a) (2004); and (2) because the three counts arose from the same behavioral incident, the district court erred in using the *Hernandez* method to increase his criminal-history score. We affirm.

FACTS

As Adam Rein walked out of his house between 2:00 and 2:30 a.m. on April 11, 2006, he heard a large explosion and saw a flash, which he estimated to be about three feet in diameter. Rein estimated that the explosion occurred about 30 feet away from him, between his neighbors' porch and a tree in their yard. A short time later, Rein heard a second large explosion from a farther distance away.

Later that morning, Rein's neighbor, Kathleen Grebe, noticed streaks on her dining room window. She and her husband went outside and saw spots on their porch, which appeared to have been made by a liquid, and streaks on several windows. There were also pieces of what appeared to be charred aluminum foil scattered all over the porch.

In the afternoon, Rein went to the Grebes's home and told them about the explosion that he witnessed. They looked around the Grebes's yard and found a liquor bottle with a hole blown out of the side, more pieces of charred foil, and a new hole

underneath a pine tree. Rein estimated that the hole was almost one foot in diameter and three to four inches deep.

As a result of a police investigation of several incidents involving similar devices, appellant Andrew Malachi Wencl was charged with three counts of possession of an explosive or incendiary device in violation of Minn. Stat. § 609.668, subd. 2(b) (2004), which prohibits possession by a person who has been convicted of a crime of violence.[1] The case was tried to a jury.

Bureau of Criminal Apprehension (BCA) chemist John Tebow testified at trial that the device that caused the damage to the Grebes's home and yard is commonly known as a MacGyver bomb. Tebow testified that a MacGyver bomb consists of a closed container, aluminum foil, and a very strong acid, usually hydrochloric acid. He explained that the reaction of hydrogen chloride with aluminum produces hydrogen gas, which causes increased pressure. Eventually, the pressure ruptures the container, and the combination of the heat of the reaction and the exposure of the hydrogen to oxygen causes the hydrogen to ignite.

Tebow testified: Due to a number of variables, it is difficult to predict how far the acid and fragments will travel. The acid, which corrodes metal and can injure a person's skin, lungs, and eyes, is the most dangerous component. A MacGyver bomb could also start a fire if there was a fuel source, such as paper, cotton, or gasoline, around the bottle when it ruptured.

[1] Appellant has a prior conviction for second-degree arson, which is defined as a crime of violence under Minn. Stat. § 624.712, subd. 5 (2004).

The jury found appellant guilty as charged, and the district court sentenced appellant on all three counts. This appeal challenging the convictions and sentences followed.

D E C I S I O N

I.

A person who has been convicted of a crime of violence is prohibited "from possessing . . . an explosive device or incendiary device." Minn. Stat. § 609.668, subd. 2(b) (2004).

> "Explosive device" means a device so articulated that an ignition by fire, friction, concussion, chemical reaction, or detonation of any part of the device may cause such sudden generation of highly heated gases that the resultant gaseous pressures are *capable of producing destructive effects*. Explosive devices include, but are not limited to, bombs, grenades, rockets having a propellant charge of more than four ounces, mines, and fireworks modified for other than their intended purpose. *The term includes devices that produce a chemical reaction that produces gas capable of bursting its container and producing destructive effects.* The term does not include firearms ammunition.

Minn. Stat. § 609.668, subd. 1(a) (2004) (emphasis added).

Appellant does not dispute that he possessed MacGyver bombs nor that MacGyver bombs are "devices that produce a chemical reaction that produces gas capable of bursting its container." He argues that his MacGyver bombs were not explosive devices

within the meaning of the statute because they did not produce destructive effects covered by the statute[2] and were not capable of producing destructive effects.

"Construction of a criminal statute is a question of law subject to de novo review." *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002). Under the plain language of the statute, it was not necessary to show that appellant's MacGyver bombs actually produced destructive effects; to meet the statutory definition of "explosive device," it is only necessary that the device be capable of producing destructive effects.

Appellant argues that testimony at trial did not establish that his MacGyver bombs were capable of producing destructive effects. In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the

[2] Appellant contends that the bomb that exploded in the Grebes's yard, which was made with toilet-bowl cleaner, did not produce a destructive effect because the toilet-bowl cleaner, rather than the explosion, caused any stains on the porch. But appellant does not explain why any destructive effect of the toilet-bowl cleaner, which was a component of the bomb and was sprayed by the explosion, should not be considered to be a destructive effect of the bomb and the explosion.

defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

Evidence addressing the capability of appellant's MacGyver bombs to produce destructive effects included Rein's testimony about the loud explosion that he heard and the large fireball that he saw; Grebe's testimony about the damage done to her house and yard; and Tebow's testimony about the nature of the devices, particularly his testimony that a MacGyver bomb sprays an acid that can cause serious personal injury if it lands on a person and that the fireball resulting from the explosion can ignite combustible material.

Appellant argues that Tebow's testimony should be disregarded because he lacked personal experience with MacGyver bombs and Tebow was not able to testify about whether a bomb actually created by appellant was capable of producing destructive effects. But Tebow's testimony showed that he understood the components of a MacGyver bomb and how the components react together. And Rein and Grebe testified about the effects of a bomb actually created by appellant.

Rein's and Tebow's testimony indicated that the damage caused by the explosion at the Grebes's property was limited due to the place where the bomb exploded rather than because the bomb was not capable of causing greater damage. Although there was no evidence regarding the actual effects of the other MacGyver bombs that appellant used, Tebow's testimony indicated that any MacGyver bomb that explodes is capable of causing destructive effects if it goes off near a person or a highly flammable material. *See State v. Brulport*, 551 N.W.2d 824, 829 (Wis. Ct. App. 1996) (rejecting argument that

evidence was insufficient to show that MacGyver bomb created an unreasonable and substantial risk of death or great bodily harm). And Rein's and Grebe's descriptions of the effects of the bomb actually created by appellant were consistent with Tebow's testimony about any MacGyver bomb. We conclude that the evidence was sufficient to allow the jurors to conclude that the MacGyver bombs that appellant created were capable of producing destructive effects and that the bombs met the statutory definition of "explosive device." *See The American Heritage Dictionary of the English Language 508* (3d ed. 1992) (defining "destructive" as "causing or wreaking destruction; ruinous").

Appellant's argument that a MacGyver bomb is similar to opening a soda-pop can that has been shaken is without merit. *See id.* at 827-28 (rejecting argument that MacGyver bombs are similar to pressure caused by shaking a soda can).

Because appellant failed to raise in the district court the claim he makes on appeal that Minn. Stat. § 609.668 is unconstitutionally vague, the issue is waived on appeal. *See State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980) ("The law is clear in Minnesota that the constitutionality of a statue cannot be challenged for the first time on appeal.").

II.

Under the *Hernandez* sentencing method, when a district court sentences a defendant on the same day for multiple convictions, one point is added to the defendant's criminal-history score for each conviction sentenced before calculating the criminal-history score for the next sentence, provided that the offenses are not part of a single behavioral incident or course of conduct and did not involve the same victims. *State v. Hernandez*, 311 N.W.2d 478, 480-81 (Minn. 1981). The *Hernandez* method may not be

used to increase an offender's criminal-history score for a subsequent offense if the offenses arose from a single behavioral incident within the meaning of Minn. Stat. § 609.035, subd. 1 (2004). *State v. Hartfield*, 459 N.W.2d 668, 670 (Minn. 1990).

In determining whether a series of offenses constitutes a single behavioral incident, the relevant factors are: (1) unity of time and place and (2) whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective. *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). The district court's determination whether multiple offenses are part of a single behavioral incident is a fact determination and should not be reversed unless clearly erroneous. *State v. Carr*, 692 N.W.2d 98, 101 (Minn. App. 2005). The state has the burden of proving that the offenses were not part of a single course of conduct. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

Appellant argues that his convictions were part of a single behavioral incident because the offenses were complete when the bombs were made, rather than when they went off, and because all three offenses occurred in close proximity to each other in time and location. The evidence showed that appellant possessed and set off MacGyver bombs on at least two different dates at three different locations. On April 11, 2006, he set off the bomb that damaged the Grebes's property. On April 15, 2006, he set off a MacGyver bomb in downtown Owatonna. He also admitted to setting off MacGyver bombs, during the same general time frame, in the back yard and alley of the home where he was staying.

The district court's finding that appellant's convictions did not arise from a single behavioral incident is not clearly erroneous. *See State v. Bertsch*, 689 N.W.2d 276, 284-86 (Minn. App. 2004) (determining that state did not meet its burden of proving that all 19 counts of possession of child pornography constituted more than a single behavioral incident when record did not show when acts of possession occurred), *aff'd in part and rev'd in part on other grounds*, 707 N.W.2d 660 (Minn. 2006); *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997) (affirming finding that four drug sales did not arise from a single behavioral incident when they took place on four different dates at three different locations).

Affirmed.